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DISCRIMINATION AND THE COMMERCE CLAUSE:
APPLICATION OF STATE CIVIL RIGHTS ACTS
IN INTERSTATE AND FOREIGN COMMERCE*

Despite its originally exclusive interpretation,¹ the Commerce Clause ² has not entirely prevented the states from exercising regulation over the interstate and foreign commerce which passes within their boundaries.³ In the absence of conflicting or superseding federal enactment,⁴ there is said to exist in the state a residuum of power to legislate in this regard,⁶ except


1. "[The power of] a state [to] regulate commerce with foreign nations and among the states ... cannot be admitted". Gibbon v. Ogden, 9 Wheat. 1, 201 (U. S. 1824). 
   "... the power to regulate foreign commerce is necessarily exclusive [to the federal government]". Id. at 228.

2. U. S. CONST. Art. I, § 8, cl. 8. "The Congress shall have the power to regulate commerce with foreign nations and among the several states..."

3. Professor Willis observes that "... in the last few decades, the Supreme Court has been permitting the states to exercise many forms of social control which indirectly or incidentally affect interstate commerce, when the states in doing so are undertaking to protect some general social interests of the people of the state, even when the interstate commerce is a matter of national concern and the federal government's power is regarded as exclusive." WILLIS ON CONSTITUTIONAL LAW, 328. See illustrations, id. 323-331; footnotes 16 and 17, Morgan v. Virginia, 328 U. S. 373 (1946).


where the legislation would burden commerce by discriminating against out-of-state commerce or disturbing national uniformity.7

Such state legislation in the civil rights field was examined in Bob-Lo Excursion Company v. Michigan.8 Appellant, a Michigan corporation which maintained recreational facilities on Bois Blanc, an island located in the Canadian territorial waters of the Detroit River, denied passage to the island and the use of its facilities to a Negro in accord with a standing company policy of racial exclusion.9 Perhaps because there was doubt as to the applicability of the anti-discriminatory provisions of the Interstate Commerce Act10 in the instant context,11 criminal proceedings were instituted against the excursion company under the Michigan Civil Rights Act,12 which clearly prohibits racial and religious discrimination. Appellant demurred and challenged the constitutionality of the statute as enforced, citing the fact that Bois Blanc is politically a part of the Province of Ontario and asserting amenability to federal regulation only.


7. "Whatever subjects of this power are in their nature national ... may justly be said ... to require exclusive legislation by Congress". Cooley v. Board of Wardens, 12 How. 298, 319 (U. S. 1851); Minnesota Rate Cases, 230 U. S. 352, 359, 400 (1913); Edwards v. California, 314 U. S. 160, 176 (1941); Southern Pacific Ry. Co. v. Arizona, 325 U. S. 761 (1945).


9. The policy of excluding Negroes from the use of these facilities had been in effect for twenty-one years prior to 1945. The assistant general manager testified that the policy was designed to insure the continued success of the enterprise. Record of Trial, 10, 11.


11. The Interstate Commerce Act excludes from the purview of its operation transportation by small craft of not more than one hundred tons carrying capacity or not more than one hundred indicated horsepower, and also ferries. 60 Stat. 1097 (1946), 49 U. S. C. § 903(g) (2) (1946). The record does not disclose the size of the excursion boat involved here, and whether or not the vessel would be called a ferry is open to doubt.

Two fundamentally divergent approaches to the decision were offered by
the facts. The first, followed by the Court majority, turned upon the pecu-
liarly local character of the commerce involved: since both legal and physical
barriers prevented intercourse between the appellant's patrons on Bois
Blanc and Canadians, the island was in effect an amusement adjunct of
Detroit.13 On this showing, the Court held that the merely technical foreign
aspect of the Bob-Lo excursions should not operate to preclude state regula-
tion.14 In effect the commerce was held to be wholly intrastate for this
purpose, and the issue under the Commerce Clause deftly avoided.

On the other hand, Mr. Justice Douglas, concurring, and Mr. Justice
Jackson, dissenting, concluded that the commerce was indeed foreign, but
arrived at opposite conclusions as to the permissibility of state regulation.
Mr. Justice Douglas reasoned that there was here no superseding or pres-
ently conflicting statute. The Interstate Commerce Act was apparently
not in issue 15—and even if it had been, it could not have conflicted for it
also prohibits exclusion; Canadian law, with which the Bob-Lo excursions
might be held concerned, also indicates clear opposition to racial discrimina-
tion;16 and the states do not and cannot require racial exclusion under the
Fourteenth Amendment.17 Finding no possibility of conflict in regulation,
and noting the enforcement of the common law rule that common carriers
must provide equal service to all 18 as an indication of national policy, Mr.
Justice Douglas concluded that the statute constituted no undue burden on
foreign commerce.19 Mr. Justice Jackson, however, considered the tech-

13. Although passengers were subject to customs and immigration inspection, trans-
portation to the Canadian mainland was forbidden by Canadian authorities. No intermedi-
ate stops were made, and patrons were returned to Detroit the same day. Record of
Trial, 8.
15. See note 11 supra.
16. See Statutes of Ontario, Canada, 8 Geo. VI c. 51 (1944).
Further indica of a sympathetic Canadian policy appear in Re Drummond Wren,
[1945] O.R. 778, where the court, in ruling that racial covenants are contrary to current
55c, 56: "... the United Nations shall promote universal respect for and observance of
human rights and fundamental freedoms for all without distinction as to race... [and]
all members pledge themselves to take joint and separate action [for that purpose]."16
17. "No state shall ... deny to any person within its jurisdiction the equal protection
of its laws." U. S. CONST., Art. XIV, cl. 1. Yick Wo v. Hopkins, 118 U. S. 356 (1886);
Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 350 (1938); Sipuel v. Board of Regents,
332 U. S. 631 (1948).
18. As applied to common carriers the rule of equal service is well settled. Missouri
Pacific Ry. Co. v. Larabee Mills, 211 U. S. 612 (1909) (whereas no one can be com-
pelled to engage in the business of a common carrier, if he does so, he becomes subject to
duties imposed on common carriers to treat all alike).
19. "The federal policy reflected in Acts of Congress indeed bars [exclusion]. ... [T]here is no danger of burden and confusion from diverse state laws... Hence I do
not see how approval of Michigan's law in any way interferes with the uniformity es-
nically foreign character of the commerce in itself conclusive and argued that the burden arose merely from the state's acting outside its proper sphere.20

The disparate emphases of the concurring and dissenting opinions assume their primary significance when directed to state proscription of segregation, rather than exclusion. Since most interstate commerce is subject to the Interstate Commerce Act's ban on exclusion, the state acts are of limited importance where the charge is exclusion. But the civil rights acts which have been enacted in eighteen states forbid not only exclusion but segregation,21 and since no federal statute specifies a carrier's conduct in this regard,22 the application of the state act would depend on the concept of an unconstitutional burden on interstate and foreign commerce then adopted.

Determination of the ultimate criterion of burden would in turn depend upon the interpretation which the Court chose to attach to its holding in the recent case of Morgan v. Virginia.23 To preclude the possibility of con-


20. Id at 43–45.

21. Today, seventeen states besides Michigan, see note 12 supra, prohibit as a discriminatory practice any difference in treatment based on race. CAL. CIV. CODE, §§ 51, 52 (Deering, 1937); COLOR. STAT. c. 35, §§ 1, 8 (1935); CONN. GEN. STAT., § 1676c (Cum. Supp., 1935); ILL. REV. STAT., c. 38, § 125 (Smith-Hurd, 1941); IND. STAT. ANN., § 10–901 (Burns, 1933); IOWA CODE, § 735.1 (1946); KANS. GEN. STAT. ANN., § 21–2424 (1935); MASS. LAWS, c. 272, § 98 (Michie, 1933); MICH. STAT., § 7321 (Mason, 1927); Neb. Rev. Stat., c. 20–101 (1943); N. J. STAT. ANN., c. 2.1–2, 3, 5 (1939); N. Y. CONSOL. LAWS, § 40 (Baldwin, 1933); OHIO GEN. CODE, 12940 (Page, 1937); PA. STAT., tit. 18, §§ 4653, 4654 (Purdon, 1930); R. I. GEN. LAWS, c. 606, §§ 28 (1938); WASH. REV. STAT., § 2686 (statute does not specifically mention public conveyances, but is phrased in broad, general language) (Remington, 1932); WIS. STAT., § 340.75 (1941). See Konvitz, The Constitution and Civil Rights 123–29 (1947).

These statutes were enacted by the states to fill the void left by the demise of federal legislation. Civil Rights Cases, 109 U. S. 3 (1883) (federal Civil Rights Acts, 14 Stat. L. 27 (1866), 16 Stat. L. 140 (1870), 18 Stat. L. 335 (1875), directed against individual discriminatory conduct, as distinguished from state action, held unconstitutional). See generally Konvitz, op. cit. supra c. 2. Their constitutionality insofar as they apply to intrastate commerce has been clearly established. Greenberg v. Western Turf Ass'ns, 204 U. S. 359 (1907); People v. King, 110 N. Y. 418 (1888). See also cases collected in Note, 49 A. L. R. 505.


flicting state regulations, the Court here nullified a Virginia statute imposing racial segregation requirements upon interstate carriers while within the state. In so holding, it revived and strongly reiterated the rationale of Hall v. DeCuir, in which the Court, similarly faced with the problem of diverse and conflicting state regulation of national commerce, had invalidated a Louisiana anti-segregation requirement as enforced against interstate carriers.

At least superficially, the reliance of the Court in the Morgan case on the Hall rationale sets up the flat rule that a state may neither require nor forbid segregation in interstate commerce. It is a negative concept of uniformity, in that what is achieved is the absence of regulation. Apparently it is this kind of uniformity which Mr. Justice Jackson, from the language of his dissent in the Bob-Lo case, would require.

But in the minds of at least some of the Justices, the Morgan case may import more than it says. Its predecessor, the Hall opinion, was in its time not allowed its full possible effect, for shortly after the decision, state statutes requiring interstate carriers to employ Jim Crow cars within state borders were upheld. The state courts' construction of the statutes was that the required segregation applied only to intrastate passengers, and that there was therefore no burden on interstate commerce. The end actually furthered by the Court was that of segregation.

The Court in the Morgan case, aided by the explicit statement of the lower court that the Virginia statute was intended to apply to interstate commerce, clearly reversed the trend, and in so doing conformed it to currently widespread notions of racial equality. Today, both on the Court and off, new inroads are constantly being made on the institution of segrega-

24. “A burden may arise from a state statute which requires interstate passengers to order their movements on the vehicle in accordance with local rather than national requirements.” Id. at 380, 381.


26. 95 U. S. 485 (1877).

27. LA. REV. STAT. 1870, p. 93.


29. The construction of the segregation statute by the highest court of the state was held to be the conclusive determinant of its intrastate nature. Louisville, N. O. & T. Ry. Co. v. Mississippi, 133 U. S. 557 (1890). In McCabe v. Atchinson, T. & S. F. Ry. Co., 235 U. S. 151 (1914), the Court indicated in dictum that in the absence of state court construction, the statute would be construed as having been intended to have only intrastate application, on the assumption that the state legislature would not pass a law subject to invalidation. Id. at 160

Harlan, J., dissenting in Louisville, N. O. & T. Ry. Co. v. Mississippi, supra, however, considered the decision inconsistent with the Hall case. Id. at 592. And in Chesapeake & O. Ry. Co. v. Kentucky, 179 U. S. 388 (1900), he dissented without opinion.

30. “[T]he statute embraces all motor vehicles and all passengers, both interstate and intrastate.” Morgan v. Virginia, 184 Va. 24, 37, 34 S. E. 2d 491, 496 (1945).
The Morgan case is but another in the series. Thus the Morgan case may in time be interpreted as recognizing a developing national policy against segregation, the policy itself, rather than the absence of policy providing the basis of the uniformity required by the Commerce Clause.

If the Court were required to circumvent the Morgan rationale rather than invalidate eighteen Civil Rights Acts in their application to interstate and foreign commerce, it might well choose this means to do so. Justices Black and Rutledge, who concurred in the result in the Morgan case, would presumably vote to sustain the statutes. While Mr. Justice Douglas was in the majority in the Morgan case, his insistence on basing his decision in the Bob-Lo case on evidences of national policy suggests that he too might concur. And enough of the remaining Justices to constitute a majority might well limit the rationale of the Morgan case, when faced with the prospect of striking down the civil rights statutes of eighteen states.

The legal effect of such a decision would be to leave untouched the doctrine of national uniformity as a test of burden on interstate and foreign commerce while repudiating the result of Hall v. DeCuir. Its practical effect would be merely to permit those states in which segregation is not practised to prohibit segregation in matters touching interstate and foreign commerce. But the decision would further define a national policy against segregation and thus help pave the way for its eventual elimination.

31. The courts have helped to shape this general development in recent decisions. Exclusion of Negroes from grand juries has been held contrary to the Fourteenth Amendment. Smith v. Texas, 311 U. S. 128 (1940). Exclusion of Negroes from primaries was held violative of the Fifteenth Amendment. Smith v. Allwright, 321 U. S. 649 (1943). Racial restrictive covenants will not be enforced by federal courts as violative of the Fourteenth Amendment. Shelby v. Kraemer, 334 U. S. 1 (1948). See generally, Konvitz, op. cit. supra note 21, 109-132; Mangum, The Legal Status of the Negro (1940), c. 3; and Waite, The Negro in the Supreme Court, 30 Minn. L. Rev. 219 (1946).

That a powerful undercurrent of prejudice and fear still prevents federal civil rights legislation is of course painfully obvious, and well evidenced by the reception accorded the President's civil rights program by certain groups and the subsequent formation of the States' Rights Party. N. Y. Times, Jul. 18, 1948, p. 1, col. 1. It may be noted, however, that the program was as ambitious as any yet attempted in the civil rights field. See the Report of the President's Committee on Civil Rights, To Secure These Rights (1947). And while an end to segregation in the military services and federal jobs, long sought by Negro groups, see N. Y. Times, Apr. 1, 1948, p. 1, col. 2, is still unattained, decisive steps have been taken in this direction with the establishment of the President's Committee on Equality of Treatment and Opportunity in the Armed Services, and the Fair Employment Board composed of members of the Civil Service Commission. See N. Y. Times, July 28, 1948, p. 1, col. 8. Legislation has aided Negroes in certain other fields. 48 Stat. 1185 (1934), 45 U. S. C. 151 et seq. (1946) (collective bargaining agents must represent all employees in the bargaining unit without discrimination because of race). Steel v. Louisville & N. Ry. Co., 323 U. S. 192 (1944); Tunstall v. Brotherhood, 323 U. S. 210 (1944).

32. See note 21 supra.


34. See note 19 supra.

35. But see Burton, J., dissenting, Morgan v. Virginia, 328 U. S. 373, 389-394 (1946), on the ground that invalidation of the Virginia statute as applied would compel invalidation of all the rights statutes.